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Supreme Court, U.S.
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No. 93-906

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

SCHULMERICH CARILLONS, INC.,
Petitioner,

v.

THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the lower court's conclusion that Section 402(d) of the Pennsylvania Unemployment Compensation Law is not preempted by federal labor law is consistent with the legislative history of the Social Security Act and supported by this Court's previous decisions in the *New York Telephone* and *Baker* cases?

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STATEMENT OF THE CASE

This case involves the grant of unemployment compensation benefits by the Pennsylvania Unemployment Compensation Board of Review ("the Board") to employees of Petitioner, Schulmerich Carillons, Inc., ("Employer"). The employees were at all relevant times represented by the International Association of Machinists and Aerospace Workers Union, Local 1092 ("Union"). The courts below upheld the grant of benefits based on the provisions of Pennsylvania's Unemployment Compensation Law, which allow for the awarding of unemployment compensation to employees who are unemployed due to a lockout. 43 P.S. §802(d), Act of December 5, 1936, Second Ex. Sess., P.L. 2897 (1937). See page 25a of the Appendix ("App. at

25a") to the Petition for Writ of Certiorari ("Petition"). The Board's findings of facts, fully adopted by the lower courts, are as follows.

The collective bargaining agreement in effect between the Union and the Employer expired at midnight on June 28, 1991. App. at 3a. In May 1991, the parties commenced negotiations aimed at arriving at a new contract; however, as of June 28, 1991, no agreement had been reached. App. at 4a. The Employer made a final offer on a new contract to the Union on June 28, 1991, but it was rejected. *Id.*

On June 28 and July 1, 1991, the Union offered to continue work under the same terms and conditions of the expired contract while negotiations continued. *Id.* The

Employer agreed to permit work to continue under the expired labor agreement's economic terms, but at no time offered to include all the preexisting non-economic terms and conditions of employment. *Id.*[1] The Union established picket lines and employees stopped working on July 1, 1991. The stoppage continued until August 19, 1991, when an agreement was reached on a new three-year contract. *Id.* The employees returned to work on or about August 19, 1991. *Id.*

Pennsylvania's Bureau of Unemployment Compensation Benefits and Allowances ("BUCBA") was presented with a claim for unemployment compensation

[1]Contrary to the Board's and the lower court's findings of fact in this regard, the Employer in its Petition misrepresents the record when it states that it was agreeable to continue all of the contractual terms and conditions with the possible exception of the arbitration clause. Petition at p. 5.

benefits for the period the employees were out of work. BUCBA concluded that the work stoppage was the result of a lockout, consistent with the Pennsylvania Supreme Court's analysis in the *Vrotney Unemployment Compensation Case,* 400 Pa. 440, 163 A.2d 91 (1960). App. at 11a, 14a, 29a. In *Vrotney*, the supreme court held that an employer's refusal to allow employees to continue working under the terms and conditions of the expired contract constitutes a lockout. Conversely, the court concluded that a refusal by employees to return to work under the terms and conditions of the expired contract constitutes a strike.

After a hearing, the Unemployment Compensation Referee affirmed BUCBA's determination, rejecting the

Employer's argument that the strike/lockout distinction was preempted by federal labor law, noting that this same issue had previously been raised and rejected by the Pennsylvania courts. App. at 11a, 16a. On appeal, the Board wholly adopted as its own the Referee's Findings of Facts and Determinations. On further appeal, the Commonwealth Court upheld the Board's grant of benefits and, thereafter, the Pennsylvania Supreme Court, on September 9, 1993, denied the Employer's Petition for Allowance of Appeal without an opinion. App. at 7a-9a; 1a.

SUMMARY OF ARGUMENT

The Petition fails to provide any legitimate basis or reason for this Court to grant the writ of certiorari. Relying on one case involving facts that are irrelevant to the instant matter, the Petition asserts that Pennsylvania's unemployment compensation statute is preempted by, and is inconsistent with, federal labor law principles--a contention that specifically ignores and disregards this Court's holdings in the *New York Telephone Co.* and *Baker* cases, as well as the Third Circuit's specific holding in the *Duer Spring* case. The Petition also attempts to raise a constitutional claim that it waived in the lower courts and which is, accordingly, not properly before this Court.

Whittled to its core, this Petition arises out of the Employer's dissatisfaction and/or disagreement with the manner in which Pennsylvania's legislature has chosen to condition the receipt of unemployment benefits and the lower courts' enforcement of those conditions. Such an appeal is fatally deficient to warrant this Court's review. The Petition should be denied.

REASONS FOR DENYING THE WRIT

SECTION 402(D) OF THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION LAW IS NEITHER PREEMPTED BY, NOR INCONSISTENT WITH, FEDERAL LABOR LAW, AND IN AWARDING BENEFITS HEREIN, PENNSYLVANIA WAS MERELY EXERCISING THE BROAD AUTHORITY AND DISCRETION AFFORDED IT BY BOTH CONGRESS AND THIS COURT TO OPERATE ITS UNEMPLOYMENT INSURANCE PROGRAM AND ESTABLISH QUALIFYING REQUIREMENTS WITHOUT FEDERAL INTERFERENCE.

The Employer contends that because Pennsylvania's unemployment compensation system is subsidized by the federal government, it must be preempted by federal labor law to the extent that the state law provides benefits under

circumstances in which the employer is acting in compliance with federal law. Relying exclusively on this Court's decision in *Litton Financial Printing Division v. National Labor Relations Board, a Division of Litton Business Systems, Inc.*, 111 S. Ct. 2215 (1991), a case which held that an employer does not commit an unfair labor practice under the National Labor Relations Act ("NLRA") when it refuses to arbitrate post-contract expiration grievances, the Employer reasons that the state cannot award benefits based on an employer's refusal to allow employees to continue to work under all of the terms and conditions of an expired contract, including the arbitration clause. The Employer views this as a conflict between federal and state law and argues it is a basis for this Court to grant certiorari. The Employer is wrong.

Indeed, it is the federal involvement in state unemployment insurance programs, referred to by the Employer herein as a basis for a finding of preemption, that led to this Court's previous refusal to find a state unemployment compensation statute to be preempted by the NLRA. In *New York Telephone Company v. New York State Department of Labor*, 440 U. S. 519 (1979), a case ignored by the Employer in its Petition, this Court concluded that New York State's law providing for the awarding of unemployment benefits to striking employees was not preempted by the NLRA. Responding to the employer's contention, similar to that of the Employer herein, that awarding benefits to striking employees forces an employer to do that which the federal labor law does not require (i.e. finance a strike), the majority of the Court pointed to the legislative history of the Social Security Act,

as "[making] it absolutely clear that Congress intended the several states to have broad freedom in setting up the types of unemployment compensation that they wish." 440 U. S. at 537. The Court further stated:

> [W]hen Congress wished to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the State's freedom to legislate in this area.

Id. at 538.

Although the Court explicitly recognized that paying benefits to strikers arguably alters the delicate balance of bargaining power that the NLRA sought to protect, it

concluded that Congress intended to tolerate such an impact on the collective bargaining process in order to effectuate the joint federal-state unemployment insurance scheme set forth in Title IX of the Social Security Act, which was passed within five weeks of the NLRA. *Id.* at 544. *See also Ohio Bureau of Employment Services v. Hodory*, 431 U. S. 471 (1977).

Pennsylvania's statute no more regulates or impacts the collective bargaining process than does New York's statute. Indeed, Pennsylvania has chosen a much less expansive policy than New York by refusing to award benefits to strikers, which pursuant to the *New York Telephone* case it could permissibly do. Rather, it has chosen to make benefits available only to employees that are locked out, "mak[ing] the strike/lockout distinction on

the basis of the status quo, a neutral objective standard which does not tilt the scale in either direction." *Duer Spring and Manufacturing Co., Inc. v. Commonwealth of Pennsylvania, Department of Labor and Industry*, 906 F.2d 968, 971 (3d Cir. 1990).[2] As aptly described by the lower court, Pennsylvania's statute does not require the employer to do anything, but rather, presents an employer with a choice that applies equally to employers and employees--that is, whether to alter the status quo. App. at 7a and cases cited therein.

That Pennsylvania's unemployment compensation law allegedly serves as an inducement for an employer to

[2]In *Duer*, another case ignored by the Employer, the United States Court of Appeals for the Third Circuit, relying on the *New York Telephone* case, rejected an almost identical preemption argument as it applied to the very same lockout provision at issue here.

take action that it would not otherwise be required to take under federal law is of no moment. Indeed, the Employer's argument is no different than striking employees contending that they are entitled as a matter of federal preemption to unemployment compensation benefits based on their protected NLRA right to strike--a proposition specifically rejected in *New York Telephone*. Moreover, such "inducement" is no different than that presented to employees in *Baker v. General Motors Corp.*, 478 U. S. 621 (1986). In *Baker*, this Court affirmed the principles set forth in *New York Telephone* and upheld Michigan's unemployment compensation law depriving compensation to employees that contribute to a strike fund. This Court rejected the employees' contention, almost identical to that raised by the Employer herein, that denying benefits interfered with their rights under the NLRA; namely, the

right to support a strike by contributing to a strike fund. *Id.* at 636-638. *Baker* makes clear that while there may be some interplay between the NLRA and state unemployment statutes, this Court has refused to find preemption based on this interplay, even where the failure to preempt adversely affects an employee's right to compensation. The refusal to preempt is based on a neutral federal policy, derived from the legislative history of the Social Security Act and prior decisions of this Court, in favor of allowing states to operate unemployment insurance programs without federal interference, save for those conditions specifically set forth in the Social Security Act.[3]

[3]Other states have similarly awarded benefits to employees even where the effect of doing so might impact on an employer's ability to exercise rights available under federal labor law. *See Federico, et al. v. Brannan Sand & Gravel Co.*, 788 P.2d 1268 (Colo. 1990), *Plymouth-Stamping v. Lipshu, et al.*, 431 Mich. 1, 461 N.W.2d 859 (Mich. 1990), *Four Queens, Inc. v. Board of Review*, 105 Nev. 53, 769 P.2d 49 (Nev. 1989), and *Baugh v. United Telephone Co.*, 54 Ohio St. 2d 419, 377 N.E.2d 766 (Ohio 1978) (cases where permanently replaced striking employees were awarded benefits notwithstanding employers' legal right to replace employees during a strike).

Accordingly, the Petition utterly fails to provide any basis on which this Court should review this matter. It has not pointed to any conflict between the decision below and any other state court decision, or decisions of any federal court. In an attempt to raise a "conflict," it relies solely on one case of this Court not directly relevant to the instant issue. The Petitioner ignores a series of United States Supreme Court cases and a federal circuit court case supporting the conclusion that the decision below was consistent with federal law and should not be preempted. All that remains is the Petitioner's disagreement with the outcome of the decision below. The Petition should be denied.[4]

[4]In its Petition, the Employer also raises a Fourteenth Amendment argument. The lower court specifically refused to address this assertion based on the Employer's failure to raise it in a timely fashion. App. at 6a, n.3. Having waived this contention below, and having failed in the Petition to specifically challenge the lower court's refusal to address its constitutional claim, this issue is not properly before this Court. *See Yee v. City of Escondido, Calif.*, 112 S. Ct. 1522, 1531 (1992); *Delta Airlines v. August*, 450 U. S. 346, 362 (1981).

CONCLUSION

For the foregoing reasons, Respondent, Unemployment Compensation Board of Review requests that the Petition for Certiorari be denied.

Respectfully submitted,

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